No. 17-130

In the

# Supreme Court of the United States

RAYMOND J. LUCIA

*Petitioner,*

v.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF *AMICUS CURIAE* DAVID ZARING IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICUS CURIAE*

*Amicus* David Zaring is associate professor at the Wharton School of the University of Pennsylvania. He is a scholar of financial regulatory institutions, and has written in particular about the Securities and Exchange Commission's administrative proceedings program challenged in this case. He has no financial or other interest in this case.[1]

[1] This brief is filed pursuant to consents obtained from all parties. No person other than amicus and his counsel have authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

## SUMMARY OF THE ARGUMENT

Congress has encouraged agencies to formulate policy through formal adjudication since the passage of the Administrative Procedure Act ("APA") in 1946. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521. This brief reports on a comprehensive study of how formal adjudication has worked at the Securities and Exchange Commission ("SEC") in the five years since the passage of the Dodd-Frank Wall Street Reform Act of 2010, which broadened the reach of administrative proceedings. That study offers two findings that should reassure the Court that the process Congress created in the APA is functioning well at the SEC.

First, the agency's Administrative Law Judges ("ALJs") function as impartial decision-makers that serve the Commission, but do not overly influence its resolution of contested cases. Commissioners accept ALJ recommendations in such cases approximately half of the time. This suggests that while SEC ALJs serve the agency by building a factual and legal record designed to improve the quality of agency policymaking, the Commission's review of this record is just as searching and careful. The study establishes that the Commission is both the de facto and de jure final word in administrative proceedings. *See* David Zaring, *Enforcement Discretion at the SEC*, 94 Tex. L. Rev. 1155, 1184–85 (2016).

Second, a quantitative and qualitative analysis of SEC proceedings, paired with a comparison to the record of securities defendants in judicial proceedings in the Southern District of New York, shows that the SEC does not enjoy more favorable outcomes in front of ALJs than it does in front of

Article III judges. *See id.* at 1185–89. Instead, ALJs regularly rule against the agency; there is no home-court advantage when it comes to administrative proceedings.

A pillar of the administrative state, SEC ALJs serve politically accountable commissioners by supervising high-quality administrative proceedings. The Court should resist finding that the appointment of ALJs constitutes a technical violation of the Appointments Clause.

## ARGUMENT

### I. The SEC's ALJs merely carry out the policies of politically accountable agency heads.

The APA carves out a role for ALJs not as an independent judiciary, but as fair and impartial decision-makers that serve the agency by building a factual record that can be used to effectuate the agency's policies and objectives. Indeed, the outcome of ALJ decision-making rests in the hands of the agency commissioners, who need not, and do not, grant the ALJ's fact-finding or legal conclusions the respect of finality or even deference. *See* Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. Rev. 1341, 1353 (1992). The APA provides that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). Congress has directed the *agency*, not the ALJ, to interpret gaps in statutes and regulations, and to formulate policy through the process of formal adjudication. *See* Harold J. Krent

& Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. Nat'l Ass'n Admin. L. Judges 1, 29 (2005). As a result, every decision made by an SEC ALJ is reversible by the commissioners themselves, who subject those decisions to *de novo* review as a matter of law, and to searching evaluation (as expressed in lengthy opinions) as a matter of practice.

Certainly the APA fosters a certain amount of independence for administrative judges as a means toward impartial decision-making, and to ensure that the administrative judiciary is not captive to special interests. *See* James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 Wake Forest L. Rev. 1191, 1215 (2006) (explaining that the original Administrative Procedure Act's legislative history shows that Congress intended administrative judges to "conduct themselves in the manner in which people think they should—that is, as judges and not as the representatives of factions or special interests" (citing 92 Cong. Rec. 5, 5650 (1946)).[2] But the APA does not afford ALJs independence from the members of the executive branch which they serve. Congress considered and

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[2] The federal government has always worried about making its administrative adjudicators too politically accountable—and the poor record of patronage and other problems surrounding the federal hearing examiners who were replaced by ALJs underscores the weaknesses of agency judges whose appointments often reflected a degree of patronage. *See generally* Morgan Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 Yale L.J. 431 (1950) (reviewing the skepticism administrative lawyers had of pre-APA hearing examiners, and recording the large numbers dismissed from the civil service upon passage of the statute).

rejected the possibility that ALJs could be given real independence from the agency when it chose to locate appeals from ALJ decisions to the agency heads for whom they work, rather than to a centralized panel of administrative adjudicators. *See* Moliterno, *supra*, at 1227.

Under the APA's system of administrative adjudication, agency heads, not ALJs, make policy; ALJs act as impartial decision-makers and advancers of agency policy. *See id.* at 1211. As one ALJ has observed, ALJs "act on behalf of those agencies," and therefore "are often expected to help achieve agency objectives." Edwin L. Felter, Jr., *Maintaining the Balance Between Judicial Independence and Accountability in Administrative Law*, Judges' J., Winter 1997, at 22, 22. Ultimately, the agency's action is the responsibility of its politically accountable commissioners.

We can get a sense of the quantity and quality of Commission review under 5 U.S.C. § 557(b) by examining the Commission's review of initial decisions decided between December 2010 and December 2015. Excluding ministerial affirmances (affirmances based on the respondent's failure to make or perfect an appeal), Commission review of the remaining cases is quite searching and lengthy, almost always including a statement of facts, a legal analysis, and an evaluation of the appropriate form of relief, none of which are cribbed from the ALJ's initial decision. One of the incantations of the commissioners, repeated at the beginning of many of their decisions, is that their decision would be based on an "independent review of the record."[3]

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[3] Of the 197 initial decisions reviewed by the Commission over five years, forty-seven included the phrase "independent review

I identified fifty-five cases where the Commission made a substantive decision during the five year period after the passage of Dodd-Frank.[4] In twenty-nine of those decisions, the Commission affirmed the ALJ's initial decision. In eight decisions, the Commission affirmed the decision directionally, but modified the remedy. In eighteen cases, the Commission reversed the ALJ's decision. Overall, in those cases where the Commission completed its review, it reversed or modified the initial decision only slightly less than half of the time.

While the Appointments Clause is designed to make the President accountable to the electorate in appointing officers of the United States, including agency heads, the role of the administrative judiciary is to serve the executive branch and to administer the policies created by agency heads. *See* Moliterno, *supra*, at 1217. As such, the Court need not destabilize an enforcement channel that has been a part of the SEC since its founding,[5] and with

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of the record" and others included phrases like it. *SEC Commission Opinions & Orders Search*, BLOOMBERG L., https://www.bloomberglaw.com/legal_search (follow "Search & Browse" hyperlink, then "All Legal Content;" then search keywords "'initial decision' & 'independent review of the record'" and modify search criteria for source "SEC Commission Opinions & Orders" and date range 12/08/2010 to 12/08/2015).

[4] As I have noted, the review began with decisions issued in December 2010, five months after the passage of the statute, on the assumption that the agency was unlikely to change its policies so soon after promulgation.

[5] Prior to the APA's passage (and after it), the agency's adjudicators were called "hearing examiners," a term that was changed in 1978. Roger C. Crampton, *Title Change for Federal Hearing Examiners? "A Rose By Any Other Name...,"* 40 Geo. Wash. L. Rev. 918, 922 (1972) (the "title 'examiner' has long

the administrative state for as long as it has been governed by the APA.

## II. A quantitative study of recent administrative proceedings establishes that defendants do not fare better before judges than before ALJs.

This brief reports on a study of the initial decisions of ALJs since the passage of Dodd-Frank through early 2015 and analyzes the 358 initial judgments issued over that period, both quantitatively (in this section) and qualitatively (in the next section), to see what they can reveal about administrative proceedings. *See* Zaring, *supra*, at 1185–89.

It could be the case that the matters brought before the ALJs enjoy a strong home-court advantage, and further, it could be the case that the experiences for defendants would differ between federal court and administrative proceedings.

But outcomes—and some aspects of the administrative process as well—can be examined with data.

The SEC's success rate varied from year to year. For instance, in fiscal year 2014, the SEC won every administrative case that went to a judgment, including all fourteen cases that went to trial. Jenna Greene, *The SEC's on a Long Winning Streak: Criticism Rises over the Agency's In-House Forum*,

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been used by federal administrative agencies, even before the present role of the APA examiner was established"); Pub. L. No. 95-251, 92 Stat. 183, 183-84 (1978) (substituting "administrative law judge" for "hearing examiner").

Nat'l L.J. (Jan. 19, 2015).[6] The SEC has not been uniformly successful in the administrative realm, however, comprehensively losing cases in the administrative forum in 2011,[7] three times in 2013,[8] and once in 2015.[9] Moreover, most of the ALJs who work at the SEC have ruled against the agency in the last two years.

Indeed, the SEC does not enjoy more favorable

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[6] https://www.law.com/nationallawjournal/almID/1202715464297/the-secs-on-a-long-winning-streak/. By contrast, in 2014, the SEC conducted seventeen federal court trials and lost seven. Bruce Carton, *SEC Riding Lengthy Unbeaten Streak in Administrative Proceedings*, Compliance Wk. (Jan. 20, 2015), https://www.complianceweek.com/blogs/enforcement-action/sec-riding-lengthy-unbeaten-streak-in-administrative-proceedings.

[7] *See In re* John P. Flannery, Initial Decision Release No. 438, 2011 SEC LEXIS 3835 (ALJ Oct. 28, 2011) ("*In re* John P. Flannery") (finding no violation of securities laws after a lengthy administrative hearing where the SEC alleged material misstatements to shareholders); Alison Frankel, *SEC Loses Again: Agency Judge Clears State Street Execs*, Reuters (Oct. 31, 2011), https://perma.cc/NYK9-DVHE (summarizing the *Flannery* decision).

[8] *In re* Miguel A. Ferrer, Initial Decision Release No. 513, 2013 WL 5800586, at *83 (ALJ Oct. 29, 2013); *In re* S.W. Hatfield, Initial Decision Release No. 504, 2013 WL 4806917, at *4 (ALJ Sept. 10, 2013), *rev'd*, Exchange Act Release No. 73,763, 2014 WL 6850921 (Dec. 5, 2014); *In re* Jilaine H. Bauer, Initial Decision Release No. 483, 2013 SEC LEXIS 1125 (ALJ Apr. 16, 2013).

[9] *In re* Thomas R. Delaney II, Initial Decision Release No. 755, 2015 WL 1223971, at *61 (ALJ Mar. 18, 2015) (finding no supervisory liability for one respondent in a Rule 204 case that went to administrative hearing); *see also* Aruna Viswanatha, *Amid Cries of Home Field Advantage, SEC Loses Case in In-House Court*, Wall Street J. Moneybeat (Mar. 19, 2015, 2:15 PM), https://blogs.wsj.com/moneybeat/2015/03/19/amid-cries-of-home-field-advantage-sec-loses-case-in-in-house-court/ (providing a detailed account of how "the [SEC] lost part of its case" before an SEC ALJ).

outcomes in front of its ALJs than it does in front of Article III judges. The agency only received all the remedies it sought in 71% of the initial decisions in the five year period I studied. That is not too different than the rule-of-thumb rate for victories by any federal agency in federal court which, when various studies are pooled, comes out to about 69%. David Zaring, *Reasonable Agencies*, 96 Va. L. Rev. 135, 170 (2010).

The cases brought in the Southern District of New York during the period where the SEC brought enforcement claims against defendants are revealing. The Southern District of New York ("SDNY"), which covers Manhattan, is ground zero of securities enforcement in the federal courts. The court is composed of judges with experience in securities fraud cases, both civil and criminal, some of whom have a reputation for putting the agency through its paces. Of the 119 reported cases in the district, the agency's success rate was high; it received a positive result in 111 of the tracked cases. The cases were almost evenly split between claims brought under the Securities Act of 1933, 15 U.S.C. § 77a (fifty-four of 119 cases), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a (sixty-four cases), and the SEC's rate of success did not particularly differ between the two bodies of law. ALJs write shorter opinions—on average 6,200-word decisions since Dodd-Frank—while the SDNY bench as a whole has averaged 12,500 words. District judges are unlikely to cite administrative proceedings, but ALJs often cite judicial opinions. Zaring, *Enforcement Discretion at the SEC*, *supra*, at 1188-89.

Over the sample period, these results make the

SEC look like a comparably victorious enforcer regardless of the forum in which it chose to pursue enforcement; there is no statistically significant distinction between the rates of success. With eight failures in Manhattan, compared to only six over the enforcement proceedings brought before its ALJs during the same period, there is little evidence that the forum chosen by the SEC resulted in stark advantages for the agency either way.

## III. A qualitative review of the administrative proceedings where the SEC lost shows that the agency does not enjoy home-court advantage in administrative proceedings.

Much of what ALJs do is routine: defaulting defendants who fail to respond to complaints, imposing sanctions on brokers and investment advisors who have already been adjudged to commit securities fraud in federal court, and so on.

But agency adjudicators have also heard more complicated insider trading and securities fraud cases for many years, consistent with Congress's decision to expand the sorts of matters that could be brought administratively in 1990 and 2010.[10]

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[10] *See* Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, § 102, 104 Stat. 931, 933 (1990) (codified at 15 U.S.C. § 77h-1) (permitting SEC ALJs to hear claims for disgorgement); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929p, 124 Stat. 1376, 1862–65 (2010) (codified in scattered sections of 15 U.S.C.) (expanding the jurisdiction of ALJs to violations of the securities laws by defendants who were not registered by the SEC). The House, though not yet the Senate, has also turned to ALJs to reform the process involved in

A qualitative and legal examination of the cases in which ALJs have heard high-profile cases of first impression, and the context in which they hear them, shows that they treat defendants fairly. Most importantly, they do not always side with the agency. High profile rulings by ALJs against the agency have characterized the years after the financial crisis, including:

- A ruling against the agency's efforts to enforce against one of the few female private equity entrepreneurs for securities fraud. *In re* Lynn Tilton, Initial Decision Release No. 1182, 2017 SEC LEXIS 3051 (ALJ Sept. 27, 2017) ("*In re* Lynn Tilton").
- An insider trading case involving the sale of an Atlanta firm. *In re* Charles L. Hill Jr., Initial Decision Release No. 1123, 2017 SEC LEXIS 1154 (ALJ Apr. 18, 2017).
- A 2011 case against employees of State Street for misleading investors about the extent of subprime mortgage-backed securities held in an unregistered fund. *In re* John P. Flannery. That case set back the SEC's efforts to hold more bankers liable for fraud in the run-up to the financial crisis, and cannot be characterized as a politically popular or supine opinion; indeed, the SEC commissioners themselves, over two dissents, overruled

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promulgating major rules. The Regulatory Accountability Act, H.R. 5 (2017) provides that an "agency shall provide a reasonable opportunity for cross-examination" in compliance "with sections 556 and 557" of the APA for "high-impact rules." The hearings in those sections are ordinarily presided over by ALJs. *See* Regulatory Accountability Act of 2017, H.R. 5, 115th Cong. § 103(e) (2017).

> the opinion on appeal. *In re* John P. Flannery, Opinion of the Commission, Securities Act Release No. 9689, Exchange Act Release No. 73,840, Investment Advisers Act Release No. 3981, Investment Company Act Release No. 31,374, 2014 WL 7145625, at *41–42 (Dec. 15, 2014).

These cases exemplify a willingness of SEC ALJs to decide for defendants in contested cases brought by the agency's enforcement division, and they are not outliers. *See, e.g., In re* Equity Trust Company, Initial Decision Release No. 1030, 2016 SEC LEXIS 2253 (ALJ June 27, 2016) (Foelak); *In re* Donald F. ("Jay") Lathen, Jr., Initial Decision Release No. 1161, 2017 SEC LEXIS 2509 (ALJ Aug. 16, 2017) (Patil); *In re* Med-X, Inc., Initial Decision Release No. 1130, 2017 SEC LEXIS 1347 (ALJ May 8, 2017) (Patil); *In re* RAHFCO Management Group, LLC, Initial Decision Release No. 1047, 2016 SEC LEXIS 2807 (ALJ Aug. 16, 2016); *In re* The Robare Group, Ltd., Initial Decision Release No. 806, 2015 SEC LEXIS 2248 (ALJ June 4, 2015) (Grimes).

In the September 2017 Lynn Tilton case, for example, SEC ALJ Carol Fox Foelak ruled in favor of the defendant, the manager of a variety of distressed private equity funds. *In re* Lynn Tilton. Ms. Tilton had waged a long legal fight to have her case heard in federal court rather than in front of an ALJ, claiming that the agency's administrative process was unfair. Bob Van Voris & Matt Robinson, *Lynn Tilton Wins SEC Fraud Trial She Worked Hard to Avoid*, Bloomberg (Sept. 27, 2017), https://www.bloomberg.com/news/articles/2017-09-27/lynn-tilton-wins-sec-trial-she-d-worked-hard-to-avoid. She was charged with violating various anti-

fraud provisions of the Investment Advisers Act by collecting unearned fees, not disclosing conflicts of interest, and issuing false and misleading financial statements in connection with her firm's operation of three collateral loan obligation funds. The ALJ in the case found that all of the alleged violations were unproven and ordered the proceeding dismissed. *In re* Lynn Tilton.[11]

Of course, not every case brought before an ALJ is a big one. Although a great deal of attention has been paid to these high-profile cases, the mix of traditional cases to new cases has not changed much in the aggregate. Of the SEC's 610 administrative proceedings initiated in 2014, more than half of them were in three categories: "[b]roker-[d]ealer," "[d]elinquent [f]ilings," and "[i]nvestment [a]dvisors/[i]nvestment [c]ompanies" cases. U.S. Sec. & Exch. Comm'n, *Select SEC and Market Data: Fiscal 2014*, at 3 (2014) ("SEC Fiscal 2014 Data"), https://www.sec.gov/files/secstats2014.pdf. All three of these areas involve regulated entities that were unaffected by Dodd-Frank's changes to the administrative cease-and-desist proceedings. These are areas where the SEC traditionally brings

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[11] Two other prominent cases where the SEC lost excused defendants charged with failing to supervise their subordinates, both of whom were engaged in work designed to comply with SEC rules. One featured a partner at Ernst & Young; the partner's subordinate was barred from practicing before the SEC for one year, but the partner escaped sanction. *In re* Gerard A.M. Oprins, Initial Decision Release No. 411, 100 SEC Docket 393, 393, 415–16 (ALJ Dec. 28, 2010). In the other, charges against the CEO of a large multinational clearing firm were dismissed for his own failures to supervise his chief compliance officer. *In re* Thomas R. Delaney II, Initial Decision Release No. 755, 2015 WL 1223971, at *1–2, *61 (ALJ Mar. 18, 2015).

comparatively few civil actions in federal court, and there is little reason to think that ALJ supervision of the disputes reflects a newly overreaching agency—they have been part of the routine of administrative proceedings for 30 years.

Once ALJs do hear complicated cases, the opinions they render are organized and lengthy rather than cavalier; they mimic the look and feel of securities law opinions rendered by Manhattan district judges. Initial decisions accordingly follow a pattern. ALJs begin with an overview, continue with a recounting of the facts (sometimes at great length) followed by a turn to the law, which is then applied to the facts. Then, sanctions are discussed (except in the rather rare case where none are imposed), and the discussions conclude with an order. Even the citations are standard: a leading case on the factors to be considered when imposing sanctions, *Steadman v. SEC*, 603 F.2d 1126 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981), was cited in 239 of the 359 opinions in the five year period starting at the end of 2010.

Nor has it mattered, at least when the opinions issued since Dodd-Frank are compared, which ALJ decides which case; no adjudicator was more likely to rule for the SEC than others, at least based on a regression analysis of the five year sample. In the past two years, three of the five ALJs employed by the SEC during my study have ruled against the agency, in a context where the agency is bringing fewer contested cases to its in-house judges. Other empirical studies of the ALJs have also indicated no evidence of bias towards the agency. *See* Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 Wash. L.

Rev. 315 (2017); Joseph A. Grundfest, *Fair or Foul: SEC Administrative Proceedings and Prospects for Reform through Removal Legislation*, 85 Fordham L. Rev. 1143, 1178 (2016) ("there is no statistically significant difference between the SEC's success rate before ALJs and its success rate in federal court").[12]

These results are unsurprising, given that SEC ALJs offer defendants elaborate procedural protections and provide trial-like proceedings that result in a complete record on which the Commission can issue its final decision.

ALJs and Article III judges have different roles: the former issue initial decisions that cannot take effect without action (or deliberate inaction) by the Commission, while the latter issue binding final decisions subject only to review by appellate courts. Nevertheless, ALJs conduct hearings "in a manner similar to federal bench trials," giving parties the opportunity to submit briefs, and preparing decisions that contain proposed findings of fact and conclusions of law. *Office of Administrative Law Judges*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/alj (last visited Mar. 28, 2018).

For example, ALJs have the authority to administer oaths and affirmations to witnesses and oversee the taking of evidence, ruling on questions of admissibility and accepting offers of proof. 17 C.F.R. § 201.111(a), (c). In addition, parties to an SEC ALJ hearing are permitted to conduct depositions (a maximum of three depositions in a single-respondent proceeding and five depositions per side in a multi-

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[12] The best predictors of success against the agency before ALJs lie in the sort of representation that defendants have obtained and whether they are publicly traded companies alleged to have made errors in their public filings.

respondent proceeding, with an additional two depositions if a party can demonstrate a compelling need). *Id.* § 201.233(a).

The SEC's Rules of Practice also impose a *Brady* obligation on the agency—a requirement that it turn over all exculpatory information to the defendant before any hearing. *Brady v. Maryland*, 373 U.S. 83 (1963); 17 C.F.R. § 201.230. The Court has confirmed that procedural protections offered by administrative hearings are comparable to federal district court procedures. *See e.g., Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743, 757-8 (2002) (comparing the Federal Maritime Commission's Rules of Practice and Procedure with procedures for civil litigation in federal courts); *Butz v. Economou*, 438 U.S. 478, 513 (1978).[13]

As a result, the parties to an SEC administrative proceeding enjoy ample process and an opportunity to fully and fairly litigate the relevant issues, thus providing a thorough record on which a final decision by the Commission can be based.

The picture is in many ways reassuring. ALJs do not, as discussed above, offer a particularly different form of justice than do federal courts, and they do require the SEC Enforcement Division to be

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[13] The Court has held that the fact that proceedings inside an agency were brought before an ALJ indicated that the requirements of due process were satisfied rather than violated. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248–52 (1980) (holding that a civil penalty system permitting payment of fines assessed by an administrative law judge to a federal agency did not violate due process because it was "the administrative law judge, not the [Employment Standards Administration], who performs the function of adjudicating child labor violations"); *Withrow v. Larkin*, 421 U.S. 35, 58 (1975) (broadly affirming the consistency of agency adjudicative procedures with Due Process).

put through its paces. In the end, the government usually, though not always, wins, but administrative agencies usually win in the federal courts as well. *See* Zaring, *Reasonable Agencies*, *supra*, at 170.

Moreover, the SEC remains active in district court; currently, district court matters form a higher proportion of its enforcement docket than at any time in the past decade. To be sure, the SEC has brought some administrative actions in cases that are traditionally associated with civil enforcement in federal court, although this is not unprecedented. For example, 2014 featured twelve administrative proceedings brought for insider trading. SEC Fiscal 2014 Data at 3. But the SEC brought ten insider trading cases in the administrative forum in 2007, meaning that the defendants then would have been accountants, broker-dealers, investment advisors, or others registered with the commission. U.S. Sec. & Exch. Comm'n, *Select SEC and Market Data: Fiscal 2007*, at 3 (2007), https://www.sec.gov/files/secstats2007%2C0.pdf. Its use of the proceedings to hear foreign corrupt practices cases is new, although the number of such cases brought per year is in the single digits. SEC Fiscal 2014 Data at 3.

That said, as Urska Velikonja has found, "[b]y the second half of 2017, the SEC reverted completely, filing as few contested cases in administrative proceedings as it did in 2008 and 2009, well before the statutory change that sparked the controversy." Urska Velikonja, *Behind the Annual SEC Enforcement Report: 2017 and Beyond* 10 (2017), https://ssrn.com/abstract=3074073.

## CONCLUSION

ALJs are not independent officers, but carry out the policies of the agency heads for whom they work. In addition to keeping routine matters off of court dockets, the SEC's ALJs offer defendants elaborate procedural protections, and conduct high quality proceedings that a quantitative and qualitative analysis shows is not biased toward the agency. For the foregoing reasons, the Court should not find that ALJs are officers of the United States within the meaning of the Appointments Clause.

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